

# ANTIPATHY, PARADOX AND DISCONNECT IN THE IRISH STATE’S LEGAL RELATIONSHIP WITH THE IRISH LANGUAGE

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## INTRODUCTION

There is no denying that with the passing of the Official Languages Act 2003 (OLA 2003)<sup>1</sup> the status and presence of the Irish language has been strengthened. Provisions relating to public signage and bilingual requirements, in particular, have resulted in the Irish language becoming more visible in daily life.<sup>2</sup> It is also clear, however, that the core objective of the Act, “to promote increased *use* of the Irish language for official purposes”, has not been met satisfactorily.<sup>3</sup> Annual Reports from the Office of the Language Commissioner<sup>4</sup> have revealed a lack of government commitment to the Act and, as a corollary, a lack of compliance by public bodies with respect to the implementation of the language scheme system—the core provision of the Act.<sup>5</sup> Moreover, difficulties with implementation have exposed the extent to which the Irish public sector lacks the necessary linguistic infrastructure within which the schemes could be effectively fulfilled.

Positioned within the context of ongoing debate concerning reform of the OLA 2003, most recently under the Heads of the Official Languages (Amendment) Bill 2014, this article provides a critical examination of the Irish State’s legal position regarding the Irish language. In revealing antipathy, paradox and disconnect, both historically and in a contemporary context, the article argues for a reconceptualised debate about the role of law in the protection and promotion of the Irish language. Drawing, in particular, on jurisprudence from the Supreme Court of Canada, the article argues that the legal approach to the Irish language should be underpinned by a vision and conception of substantive equality. Such an approach embodies a more purposive approach to the implementation of language rights and language legislation. In Ireland there is, it is argued, an antipathy to substantive conceptions of equality across

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1. Official Languages Act 2003, No. 32 of 2003.
2. OLA 2003, s.9 and s.32. For further discussion see *Review of the Official Languages Act 2003—Report by An Coimisinéir Teanga under Section 29 of that Act: Commentary on the practical application and operation of provisions of that Act* (Oifig an Choimisinéara Teanga, July 2011), p.6.
3. OLA 2003, Long Title.
4. Established under OLA 2003 s.20.
5. An Coimisinéir Teanga, *Annual Report 2007* (Oifig an Choimisinéara Teanga, 2008); An Coimisinéir Teanga, *Annual Report 2011* (Oifig an Choimisinéara Teanga, 2012) and An Coimisinéir Teanga, *Annual Report 2012* (Oifig an Choimisinéara Teanga, 2013).

the spectrum of economic, social and cultural rights.<sup>6</sup> Within a language context this antipathy is evident in the reluctance to adopt a rights-based approach to language and a failure to provide the “means” by which language legislative provisions can be realised. It is also evident in the reluctance on the part of the State to recognise the Irish language as a subject that comes within key international and regional human rights instruments.

Mitchell reminds us that process equality focuses on the input of state action, whereas substantive equality focuses on the output.<sup>7</sup> Substantive conceptions of equality recognise that patterns of disadvantage and oppression exist in society and require law-makers and government officials to take this into account in their actions. Such an approach examines the impact of law within its surrounding social context, making sure that laws and policies promote full participation in society, by everyone, regardless of personal characteristics or group membership. From a language perspective, a substantive vision and conception of equality requires a more purposive interpretation of language guarantees and a better understanding of the instrumental and communicative nature of language as the object of a right or legislative provision. Since the 1990s, the Supreme Court of Canada has moved away from a cautious and restrained interpretation of language rights towards a more holistic and purposive interpretation. It has recognised language rights as moving beyond “political compromise”.<sup>8</sup> In the seminal case of *R v Beaulac*, the Supreme Court endorsed a substantive conception of equality that requires the Government to take “positive measures” to ensure the implementation of language rights.<sup>9</sup> Justice Bastarache stated forcefully that “language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided”.<sup>10</sup> He also reasoned that language rights must in all cases be interpreted “purposively” in a manner that is consistent with the “preservation and development of official language communities”.<sup>11</sup> Language rights are, he concluded, “meaningless in the absence of a duty on the State to take positive steps to implement language

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6. For further discussion see S. Mullally, “Substantive Equality and Positive Duties in Ireland” (2007) 23 *South African Journal on Human Rights* 291–316. See more generally comments made by stakeholders to the UN Committee on Economic, Social and Cultural Rights on Ireland’s implementation of the ICESCR on 8 June 2015 available at [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16057&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16057&LangID=E) [Last Accessed 4 March 2016]. More specifically, see the submission from the Irish Human Rights and Equality Commission, *Ireland and the International Covenant on Economic, Social and Cultural Rights: Submission to the UN Committee on Economic, Social and Cultural Rights on Ireland’s Third Periodic Report on the International Covenant on Economic, Social and Cultural Rights—List of Issues* October 2014 (IHREC, June 2015). See also F. McGinnity and others, “Winners and Losers—The Equality Impact of the Great Recession in Ireland” (The Equality Authority, Equality Research Series, March 2014).
  7. B. Mitchell, “Process Equality, Substantive Equality and Recognising Disadvantage in Constitutional Equality Law” (2015) 53 *Irish Jurist* 36 at 37.
  8. *Société des Acadiens v Association of Parents* [1986] 1 S.C.R. 549, per Justice Beetz.
  9. *R v Beaulac* [1999] 1 S.C.R. 768, para.20.
  10. *R v Beaulac* [1999] 1 S.C.R. 768, para.20.
  11. *R v Beaulac* [1999] 1 S.C.R. 768, para.25.

guarantees".<sup>12</sup> More recently, in the case of *Association des parents de l'école Rose-des-vents v British Columbia (Education)*,<sup>13</sup> the Supreme Court called for "substantive equivalence" in the delivery of language provisions in British Columbia.<sup>14</sup> In Ireland, by way of contrast, there is an antipathy both in the courts and by government to interpret and demand a more purposive interpretation of language guarantees. Judicially, this was evident in the recent case of *Ó Maicín v Ireland*<sup>15</sup> where the constitutional interpretation of Art.8 was, according to De Blacam, "grounded in pragmatism as opposed to one grounded in principle".<sup>16</sup>

This article, while acknowledging the difficult and burdensome nature of language as the object of a right or legislative provision, seeks to expose and challenge the antipathy, paradox and disconnect of the Irish State in its legal relationship to the Irish language. It begins by considering two specific, but related, paradoxes in that relationship. First, it addresses the positioning and declaratory approach taken in Art.8 of the Irish Constitution and, second, Ireland's reluctance to recognise the Irish language as a minority language, or even a lesser-used official language, for the purposes of signature and ratification of the European Charter for Regional or Minority Languages ("ECRML").<sup>17</sup> Examining both provides an important context within which to consider and challenge Ireland's antagonism towards adopting a rights-based approach in the OLA 2003. Drawing on the work of Meital Pinto and, in particular, Rogers Brubaker, the article will then move on to examine the unique difficulties posed by the constitutive elements of language.<sup>18</sup> The decision to expose such difficulties, specifically the instrumental and communicative nature of language, is taken not to justify the dismissal of claims for legal protection but rather to support the argument that a more purposive approach is necessary. Following exposure of the burdensome nature of language rights and language legislative provisions, the article then addresses the adoption and implementation of the OLA 2003. This article is primarily concerned with revealing the shift away from an equality focus at

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12. *R v Beaulac* [1999] 1 S.C.R. 768, para.20. For discussion of shifts in the interpretation of language rights in the Supreme Court of Canada see B. McLachlin P.C., Chief Justice of Canada, "The Impact of the Supreme Court of Canada on Bilingualism and Biculturalism", speech presented at McGill Law School 2008, and M.E. Hudon, "Background Paper: The Role of the Courts in the Recognition of Language Rights" (Parliament Information and Research Service, Publication No. 2011-68-E, Ottawa, Canada, January 2013).
  13. *Association des parents de l'école Rose-des-vents v British Columbia (Education)* [2015] SCC 21.
  14. *Association des parents de l'école Rose-des-vents v British Columbia (Education)* [2015] SCC 21, para.33.
  15. See further discussions below on *Ó Maicín v Ireland* [2014] IESC 12.
  16. M. De Blacam, "Official Language and Constitutional Interpretation" (2014) 52 *Irish Jurist* 90–114 at 105.
  17. ECRML, ETS No.148.
  18. M. Pinto, "Taking Language Rights seriously" (2014) 25 *King's Law Journal* 231–254; R. Brubaker, "Language, religion and the politics of difference" (2013) 19 *Nations and Nationalism* 1–20.

the Bill stage to the discretionary approach that was eventually adopted in the Act. Finally, in proposing the need for a reconceptualised debate about the relationship between law and language in Ireland, the article considers and criticises a number of the proposals advanced under the Heads of the Official Languages (Amendment) Bill 2014.<sup>19</sup> The article concludes by arguing that the remit of a reconceptualised debate should not be confined to legislative reform but should, instead, extend more broadly to constitutional protection of the Irish language under Art.8; to debate as to whether Ireland should sign and ratify the ECRML; and, finally, to whether the official status of the Irish language as an EU language should be reconsidered.

The need for a reconceptualised debate about law and the Irish language in Ireland is further supported by the recent findings of Ó Giollagáin and Charlton's sociolinguistic study on the survival of the Irish language.<sup>20</sup> According to Ó Giollagáin, primary author of the study, Irish as a vernacular language in the Gaeltacht districts of Ireland will not survive, under current conditions, beyond the next 10 years.<sup>21</sup> He also calls for "a new deal" for the Irish language.<sup>22</sup> For him, the Irish language strategy, which includes language legislation, "is devoid of analytical foundation, diagnostic rigour or strategic relevance".<sup>23</sup> It is "bien-pensant but unengaged and of limited practical use to the nature of the current crisis".<sup>24</sup>

Thus, notwithstanding Ireland's complex post-colonial language history and the ever dominant political rhetoric demanding continued austerity in the provision of public services—where the State has long accepted entitlement to legal protection of the Irish language and outwardly purports to guarantee language "rights" and language protection—it should work towards a more purposive approach in the fulfilment of language rights and the delivery of language legislative provisions. The legal approach to the Irish language, it is argued, should be underpinned by a substantive and purposive conception

19. As of January 2016, the Official Languages (Amendment) Bill 2014 remained on the Government's legislative "A" list for 2015 (Autumn 2015 Legislative Programme) but concerns had been raised in the media that delaying tactics may be used by the Government to ensure that the Bill did not progress to parliamentary debate before the general election in 2016. See further S.T. Ó Gairbhí, "Amhras ann an ndéanfar aon leasú ar Acht na dTeangachs óifigiúla le linn shaolré an Rialtais seo" (*Tuairisc*, 3 Iúil 2015/3 July 2015). For the Autumn 2015 Legislative Programme (22 September 2015) see [www.taoiseach.gov.ie/eng/Taoiseach\\_and\\_Government/Government\\_Legislation\\_Programme/](http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/) [Last Accessed 4 March 2016]. See also M. Ó Coimin, "Tús áite ag Bille na dTeangacha Oifigiúla ar chlár reachtaíochta an Rialtais" (*Tuairisc*, 23 Méan Fómhair 2015/23 September 2015). With the dissolution of the 31st Dáil in February 2016 those predictions became a reality.

20. C. Ó Giollagáin & M. Charlton, *Nuashonrú ar an Staidéar Cuimsitheach Teangeolaíoch ar Úsáid na Gaeilge sa Ghaeltacht 2006–2011: Moltai agus Beartais Fhéideartha* (Údaras na Gaeltachta, 2015).

21. C. Ó Giollagáin & M. Charlton, *Nuashonrú ar an Staidéar Cuimsitheach Teangeolaíoch*, p.6.

22. C. Ó Giollagáin, "Irish in crisis—we need a New Deal to revitalise the language" *Irish Times* 29 June 2015.

23. C. Ó Giollagáin, "Irish in crisis—we need a New Deal to revitalise the language".

24. C. Ó Giollagáin, "Irish in crisis—we need a New Deal to revitalise the language".

of equality. Legal provisions for the protection of the Irish language, as they currently stand, are failing to meet their own objectives; are failing to serve the needs of those that want to avail themselves of Irish language services and, moreover, are impeding good will towards the Irish language at a grass roots level.

## THE POSITIONING OF ARTICLE 8: FOREGOING RIGHTS FOR A UTOPIAN IDEAL?

In 1937 the Irish Free State Constitution of 1922 was replaced with *Bunreacht na hÉireann* (Constitution of Ireland).<sup>25</sup> From a language perspective this resulted in a change to the constitutional status of the Irish language. The 1937 Constitution re-emphasised the place of the Irish language as the national language of Ireland but went a step further by declaring the Irish language as the “first” official language of Ireland. Article 8 reads as follows:

- 8.1 The Irish language as the national language is the first official language.
- 8.2 The English language is recognised as a second official language.
- 8.3 Provision may, however, be made by law for the exclusive use of either of the said languages for any one or more official purposes, either throughout the State or in any part thereof.

During parliamentary debate the Taoiseach Éamon De Valera justified the superior position of the Irish language over the English language on the basis that it was the “language that is most associated with the nation”.<sup>26</sup> He claimed that Irish is the language of “the traditions of our people”.<sup>27</sup> The English language, he argued, was “the language of those who came as invaders”.<sup>28</sup>

Undeniably, the inclusion and declaratory approach of Art.8.1 must be seen in its post-colonial context and linked to De Valera’s ideal of, and for, national sovereignty. Article 8.1, to quote Ó Tuama, could be seen as part of De Valera’s “grand vision”.<sup>29</sup> By declaring the Irish language the first official language of Ireland he hoped that this would help to re-establish an Irish identity and that the Irish language would become the dominant spoken language in daily life. This was a utopian ideal in a dystopian linguistic reality but, nonetheless, De Valera disregarded arguments made during parliamentary debate seeking to amend Art.8.1 so that it would read that “the Irish and English languages are recognised equally as national and official languages”.<sup>30</sup>

25. For further background see B. Farrell (ed.), *De Valera's Constitution and Ours* (Dublin: Gill and Macmillan, 1988).

26. 67 *Dáil Debates*, 25 May 1937, Éamon De Valera on Art.8.

27. 67 *Dáil Debates*, 25 May 1937, Éamon De Valera on Art.8.

28. 67 *Dáil Debates*, 25 May 1937, Éamon De Valera on Art.8.

29. S. Ó Tuama, “Revisiting the Irish Constitution and De Valera’s Grand Vision” (2011) 2 *Irish Journal of Legal Studies* 54–87.

30. Cited in S. Ó Riain, *Pléanáil Teanga in Éirinn 1919–1985* (Dublin: Carbad, 1994), pp.25–26. See also 67 *Dáil Debates*, 25 May 1937. Discussions under Art.8.

Moving beyond the wording of Art.8.1, the positioning of that Article within the Constitution arguably merits further attention. Article 8 is situated within those articles addressing the State (Arts 4–11). While this is not unusual of itself, what is notable is that the language clause, in contrast to constitutions elsewhere, was not also included under the fundamental rights section of the Irish Constitution.<sup>31</sup> From a legal perspective one could argue that, had the Irish language been placed within Arts 40–44<sup>32</sup> of the Irish Constitution, and recognised specifically as a language *right*, this would have placed the language in a stronger legal and justiciable position.<sup>33</sup>

In seeking to understand this positioning, together with the declaratory approach, it is useful to consider the international and European rights context of that period. If language rights were not part of the international and European discourse during the interwar years, one might conclude that the approach taken in Ireland was nothing out of the ordinary. Evidently this was not the case. Minority rights, including language rights specifically, were very much the concern of the League of Nations in the interwar period. Throughout the life of the League several treaties<sup>34</sup> were concluded in which the League agreed to act as guarantor enshrining highly significant provisions for the protection of linguistic minorities.<sup>35</sup> Jurisprudentially, one need only recall the prominent ruling from the Permanent Court of International Justice in the *Minority Schools in Albania* case in 1935, which addressed minority language rights.<sup>36</sup> It is significant that John Hearne, as primary drafter of the Constitution, drew heavily on continental constitutions in the drafting of the Articles concerning fundamental rights, the lack of consideration in respect of recognising language as a right or to draw on a persuasive international discourse concerning minority language rights protection.<sup>37</sup>

31. See, for example, the Constitution of the Republic of South Africa. There, “language” is included in the Founding Provisions (art.6) but also under the Bill of Rights (art.30). See also the position in Canada: Constitution Act 1982, c.11 (UK).

32. Personal rights (Art.40), the family (Art.41), education (Art.42), private property (Art.43) and religion (Art.44).

33. This argument is made albeit acknowledging the body of case law referring to “rights” arising from Art.4 of the Free State Constitution and subsequently arising from Art.8 of Bunreacht na hÉireann. For further discussion see T. Ó Máille, *The Status of the Irish Language—a Legal Perspective* (Dublin: Bord na Gaeilge, 1990). In the case of *Attorney General v Joyce and Walsh* [1929] I.R. 526 the Court of Criminal Appeal stated that the defendants “had a double right” to give evidence in the Irish language. First, on the basis of natural justice and due process rights (Irish was their vernacular language) and, secondly, as a matter of the status accorded to the Irish language in the Constitution (p.581).

34. Minorities Treaty between the Principled Allies and Associated Powers and Poland (June 28, 1919) served as the model for later treaties and declarations.

35. For more, see P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press; New York: Oxford University Press, 1991) and more generally, H. Steiner, P. Alston and R. Goodman, *International Human Rights in Context*, 3rd edn (Oxford, UK: New York: Oxford University Press, 2008), pp.96–106.

36. *Minority Schools in Albania*, Advisory Opinion, (1935) PCIJ Ser. A/B No. 64.

37. For an in-depth discussion on the drafting of the Constitution, see G. Hogan, *The Origins of the Irish Constitution 1928–1941* (Dublin: Royal Irish Academy, 2012).



This reluctance, it may be said, can be explained by De Valera's unwillingness to recognise the Irish language as a *minority* and vulnerable language in *need* of rights protection. In seeking to re-establish the Irish language as the spoken language of the Irish people and place language at the forefront of his grand vision, De Valera, it would appear, was adamant that he would not engage and draw on an international rights discourse and jurisprudence where the Irish language would inevitably become labelled as a minority language. While due account is taken of the post-colonial political context it could, with hindsight, be argued that recognition of the Irish language as a minority language in need of protection or, in the alternative, equal to the English language, as in Canada, would have paved the way for a more robust institutional legacy and supportive linguistic framework in the public sector in Ireland.

Arguably, then, had the Irish language clause been formulated as a specific language *right* under the fundamental rights section of the Irish Constitution, Ireland might now have a very different law and language relationship and institutional legacy with respect to the provision of Irish language services in the public sector. Notwithstanding the fact that the Irish language is declared as the first official language of Ireland, this declaratory "pedestal",<sup>38</sup> lacking as it does specific reference to rights and duties, has in fact hindered the development of an effective institutional infrastructure within which to provide and guarantee language rights and effective language legislative provisions for Irish language speakers in Ireland. This writer, in broad agreement with Ó Conaill, and for the reasons outlined above, is of the view that it is particularly regrettable that discussions on Art.8 did not form part of the Convention on the Irish Constitution in 2012<sup>39</sup> and that the opportunity "to re-evaluate what the Irish language means to Ireland across legal, linguistic and cultural domains"<sup>40</sup> was not pursued.

#### IRELAND'S RELUCTANCE TO SIGN AND RATIFY THE EUROPEAN CHARTER FOR REGIONAL OR MINORITY LANGUAGES (ECRML)

The Irish State's reluctance to recognise the Irish language as a minority language has persisted to the present day and is reflected in its unwillingness to sign and ratify the European Charter for Regional or Minority Languages ("ECRML"/"Charter").<sup>41</sup> The ECRML is the most important instrument of the

38. S. Ó Conaill, "Shadow Constitutional Convention: Ó Conaill on the Irish Language" (Commentary on Human Rights in Ireland Blog, 27 September 2012: <http://humanrights.ie/constitution-of-ireland/shadow-constitutional-convention-16-oconnail-on-the-irish-language> [Last Accessed 19 June 2015]).

39. See further Convention on the Irish Constitution 2012 available at [www.constitution.ie/](http://www.constitution.ie/) [Last Accessed 4 March 2016].

40. S. Ó Conaill, "Shadow Constitutional Convention: Ó Conaill on the Irish Language" (Commentary on Human Rights in Ireland Blog, 27 September 2012: <http://humanrights.ie/constitution-of-ireland/shadow-constitutional-convention-16-oconnail-on-the-irish-language> [Last Accessed 19 June 2015]).

41. ECRML, ETS No. 148.

Council of Europe dealing with minority and regional languages. Adopted in 1992, a total of 25 states have ratified the Charter with a further eight having signed but not yet ratified it.<sup>42</sup> Ireland has not signed and ratified the Charter because of the constitutional position of the Irish language under Art.8 as Ireland's first "official" language. Article 1 of the ECRML excludes recognition of "official languages".<sup>43</sup> Article 3.1 does, however, allow "an official language which is less widely used on the whole or part of its territory" to be included for the purposes of protection under the Charter. By way of example, the United Kingdom applies art.3.1 to the Welsh language,<sup>44</sup> Finland applies art.3.1 to the Swedish language<sup>45</sup> and in Switzerland, Romansh and Italian are recognised under art.3.1 as less widely used official languages.<sup>46</sup> In drafting the Charter, the decision to include "less widely used official languages" was made to cover the situation of some official national languages which might, nevertheless, require protection given their sociolinguistic vulnerability.<sup>47</sup> This is clearly the case within an Irish language context. The position of the Irish language as Ireland's first official language under Art.8 does not, it is argued, preclude the Irish State from signing and ratifying the Charter under art.3.1. The Irish language is a less widely used official language of Ireland.

Parliamentary debate on the issue (see period 1994–1999) discloses that the reluctance to sign and ratify the Charter stemmed from a concern about the negative impact that Charter recognition would have on campaigns, at the time, to elevate the status of the Irish language from a community language to an official language of the EU.<sup>48</sup> Given that the Irish language did receive official EU language status in 2007, one might assume that the reluctance to sign the ECRML would abate.<sup>49</sup> Unfortunately, this has not been the case. In July 2007, the Minister for Foreign Affairs stated that "given the status of the Irish language as the first official language, the European Charter is not considered a suitable mechanism for its protection and promotion".<sup>50</sup> He added that there are

42. As of July 2015. See further updates at: [conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=148&CM=8&DF=&CL=ENG](http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=148&CM=8&DF=&CL=ENG) [Last Accessed 4 March 2016].

43. ECRML, art.1.

44. Section 1 of the Welsh Language (Wales) Measure 2011 recognises the Welsh language as an official language of Wales.

45. First report of the Committee of Experts on the application of the ECRML in Finland: ECRML (2001), p.3.

46. First report of the Committee of Experts on the application of the ECRML in Switzerland: ECRML (2001), p.7.

47. See further ECRML, Explanatory Memorandum, para.51.

48. See further 443 *Dáil Éireann Debates* 2, 25 May 1994; 453 *Dáil Éireann Debates* 7, 31 May 1995; 502 *Dáil Éireann Debates* 3, 23 March 1999.

49. On 1 January 2007, Irish became a full EU official language, with a temporary derogation for a renewable period of five years (see Council Regulation (EC) No 920/2005 of 13 June 2005 (OJ L 156, 18.6.2005, p.3)) stating that "the institutions of the European Union shall not be bound by the obligation to draft all acts in Irish and to publish them in that language in the Official Journal of the European Union", except for regulations adopted jointly by the European Parliament and the Council. This derogation was extended for a further period of five years (until 31 December 2016) by Council Regulation (EU) No 1257/2010 (OJ L 343, 29.12.2010, p.5).

50. 637 *Dáil Éireann Debates* 6, 4 July 2007.



“no plans to sign and ratify the Charter”.<sup>51</sup> That position has been maintained under subsequent governments despite repeated recommendations from the European Commission on Racism and Intolerance calling for signature and ratification of the ECRML.<sup>52</sup>

It is regrettable that Ireland has not signed and ratified the ECRML in accordance with art.3.1.<sup>53</sup> Despite weaknesses as a regional instrument, the monitoring process and the reports from the Committee of Experts (COMEX) are valuable in terms of providing a European yardstick in the protection and promotion of minority, regional and less widely used official languages.<sup>54</sup> Though the Charter does not guarantee language rights, it encourages states to take measures that will protect the said languages across key domains. Ratification of the ECRML would reveal, through independent reporting, the extent to which the Irish State is actually committed to protecting and promoting the Irish language across such areas as education (Art.8); within judicial authorities (Art.9); in administrative authorities and public services (Art.10); the media (Art.11); cultural activities and facilities (Art.12); and economic and social life (Art.13).

The Irish State should, it is submitted, reconsider its position with regard to the ECRML. Declaring the Irish language as a lesser used official language for the purpose of signature and ratification of the ECRML would arguably prove constructive in terms of demonstrating the reality that obtains in respect of the Irish language in Ireland. It would also support findings that the Irish language is “definitely endangered”.<sup>55</sup> Signature and ratification of the ECRML, by Ireland, would also signal greater support, at a regional level, for the protection and promotion of minority and regional languages across Europe. The position, on the one hand, of the Irish language as an official language of the EU and, on the other, the failure of the Irish state to recognise the Irish language as a lesser used official language for the purposes of signature and ratification of the ECRML exacerbates the level of disconnect and paradox in the Irish State's legal relationship with the Irish language. It points to a considerable gap between Ireland's outward-facing political rhetoric on the Irish language and the reality in terms of real commitment to public service delivery and the

51. 637 *Dáil Éireann Debates* 6, 4 July 2007.

52. *ECRI Second Report on Ireland*, Adopted 22 June 2001 CRI (2002) 3; *ECRI Third Report on Ireland*, Adopted 15 December 2006 CRI (2007) 24, p.7 and *ECRI Fourth Report on Ireland*, Adopted 5 December 2012 CRI (2013) 1, p.10. Notably in the Fourth Report, no specific recommendations regarding the ECRML were made but it was noted that the Irish authorities have not yet signed or ratified the ECRML.

53. See further S. Ó Conaill, “An Ghaeilge mar theanga oifigiúil seachas teanga mhionlaigh: an dearcadh mícheart?” in E. Fahey and C. Ní Chonchúir, *Súil ar an dlí* (Dublin: First Law, 2009), p.29; P. Blair, “The European charter for regional or minority languages” in D. Ó Riagáin (ed.), *Language and law in Northern Ireland* (Belfast: Cló Ollscoil na Banríona, 2003).

54. Robert Dunbar makes the point that, if one views the Charter from the perspective of human rights or minority rights, there are “egregious deficiencies”. See further R. Dunbar, “Implications of the European Charter for Regional or Minority Languages for British Linguistic Minorities” (2000) 25 *European Law Review* 46.

55. UNESCO Interactive Atlas of the World's Languages in Danger. Available at [www.unesco.org/languages-atlas/index.php](http://www.unesco.org/languages-atlas/index.php) [Last Accessed 4 March 2016].

implementation of language rights and language guarantees for Irish speakers. Colin Williams captured this type of juxtaposition well when he noted that public rhetoric on language protection, promotion and regulation is often hidden behind a “mask of piety”.<sup>56</sup>

For completeness, it is important to note that the Irish language in Northern Ireland is protected under the signature and ratification of the ECRML by the UK Government. Notwithstanding the very different political and language contexts in Ireland and Northern Ireland, it is ironic that the UK Government has signed a regional instrument to protect the Irish language when the Irish State has not done so, but could, under art.3.1. In the most recent report on the application of the ECRML in the UK, the Committee of Ministers to the Council of Europe recommended “as a matter of priority” that the UK Government “adopt and implement a comprehensive Irish language policy, preferably through the adoption of legislation providing statutory rights for Irish speakers” in Northern Ireland.<sup>57</sup> Given ongoing hostility towards an Irish language Act in Northern Ireland, it is unlikely that language legislation will become a reality in the near future, but reports from the COMEX remain, nonetheless, central to ensuring that the Irish language debate remains on the political agenda in Northern Ireland.

#### THE UNIQUE NATURE OF LANGUAGE AS THE OBJECT OF A RIGHT OR LEGISLATIVE PROVISION

Before moving on to examine specific difficulties involving the effective fulfilment and implementation of key provisions of the OLA 2003, it is necessary to consider the unique nature of language as the object of a right or legislative provision. In this article, a distinction is made between language rights and language legislative provisions in order to capture the very nature of the OLA as a measure that is broadly discretionary in approach as opposed to one that is strictly rights-based. As discussed in greater detail below, the majority of provisions in the OLA are not framed in terms of rights per se and, this being so, it is necessary to recognise that distinction. Provisions in language legislation can be rights-based, discretionary or an amalgamation of the two. Yet, whether language legislation be rights-based or discretionary in approach, the difficulties with respect to language capacity and linguistic infrastructure are largely the same. In other words, similar communicative and instrumental difficulties arise for all types of language legislation.

Embarking on any analysis involving the intersection of law and language, one is reminded that language is not simply a communicative tool.<sup>58</sup> Language

56. C. Williams, *Minority Language Promotion, Protection and Regulation: The Mask of Piety* (London, NY: Palgrave Macmillan, 2013), p.294.

57. Council of Europe, Report of the Committee of Experts on the Application of the European Charter for Regional or Minority Languages in the United Kingdom (4th Monitoring cycle), ECRML (2014) 1. See (CM/RecChL (2014) 3).

58. See further J. Edwards, *Minority Languages and Group Identity: Cases and Categories*

is a symbol of identity and culture deeply embedded in the political, historical and cultural constructs of states and minority language groups. It is for this reason that we have witnessed, and continue to witness, much conflict over language. In an Irish context much has been written about the constructs of Ireland's political and historical relationship with the Irish language.<sup>59</sup> It is not the intention of this article to revisit that debate. Rather, the aim is to highlight that the constitutive elements of language—language as a symbol of identity and language as a communicative tool—are inherent in the complexity of language as a social and cultural practice. The two pose significant challenges to, and for, the granting of legal protection and, thereafter, the effective fulfilment and realisation of language rights and language legislation, but at differing stages and in differing political contexts.

In broad terms, the identity element becomes most apparent in what can be described as the precursor stage; that stage where demands are made by a language group (whether minority, national, immigrant or indigenous) for language rights or language legislative protection. In order for language rights or legislative protection to be granted—for a state to agree to legally protect a national, minority or indigenous language—recognition that the language is more than a communicative tool is more likely. The challenge for the State is that the demand or claim for language protection is often part of a larger programme of sub-state nationalism.<sup>60</sup> But there are, again, differing levels to this sub-state nationalism.<sup>61</sup> The Irish language revival movement at the end of the nineteenth century was embedded in the nationalist political movement that was gaining momentum at that time. For revolutionary Irish nationalists, political independence without cultural independence was seen as worthless and, this being so, the Irish language became central to the political campaign for independence. The UK also faces cases of minority nationalism and though the linguistic division may not be as entrenched as those found in Canada or Spain,<sup>62</sup> the language debate in Northern Ireland does continue to demonstrate a significant demarcation along nationalist political lines.<sup>63</sup>

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(Amsterdam; Philadelphia: John Benjamins Pub. Co., 2010); J. Edwards, *Language and Identity* (Cambridge: Cambridge University Press, 2009).

59. For example M. Cronin, "This Side of Paradise—The Constitution and the Irish Language" in T. Murphy and P. Twomey (eds.), *Ireland's Evolving Constitution 1937–1997: Collected Essays* (Oxford: Hart Publishers, 1998); J. McCloskey, "Irish as a world language" in C. Murchaidh (ed.), *Why Irish?* (Dublin: Veritas, 2004) and G. Ó Tuathaigh, "The State and the Irish Language: an Historical Perspective" in C. Nic Pháidín and S. Ó Cearnaigh (eds.), *A New View of the Irish Language* (Dublin: Cois Life, 2008).
60. See further A. Patten and W. Kymlicka, "Introduction—Language Rights and Political Theory: Context, Issues and Approaches" in W. Kymlicka and A. Patten (eds.), *Language Rights and Political Theory* (Oxford: Oxford University Press, 2003), pp.5–7.
61. Patten and Kymlicka, "Introduction" in *Language Rights and Political Theory*, 2003, pp.5–7.
62. Patten and Kymlicka, "Introduction" in *Language Rights and Political Theory*, 2003, p.7.
63. See further D. Mac-Giolla Chríost, "Language as a political emblem in the new culture war in Northern Ireland" in C. Norrby and J. Hajek (eds.), *Uniformity and diversity in language policy: global perspectives* (Bristol: Multilingual Matters & Channel View

Once a language rights or language legislative regime has been put in place, when the State in question recognises that there is *entitlement* to protection of the language (such as in Ireland), the primary focus, it is contended, should revert to the communicative aspect of language. Given that there are differing types of language rights and legislative provisions, the extent of the one-to-one communicative aspect can differ. Drawing on the work of Heinz Kloss, it can be said that language rights vary from tolerance-orientated language rights to promotion-orientated language rights.<sup>64</sup> His distinction is essentially formulated on the broader distinction of human rights as negative rights (with the State abstaining from interference) and positive obligations (whereby the State actively promotes and fulfils language rights). For Kloss, tolerance-orientated language rights secure the cultivation of language in the private sphere while promotion-orientated language rights secure the cultivation of language in the public sphere.<sup>65</sup> Although it is the case that not all of the provisions in the OLA 2003 are formulated as rights, their essence is such that they can be categorised as promotion-orientated in nature. In fact, Ireland has long expressed its commitment to promotion-based protections for the Irish language. In its first State report to the Advisory Committee on the Framework Convention for the Protection of National Minorities—even though not recognising the Irish language as a minority issue for the purposes of protection under the Convention—reference was made to the “continued policy of successive Irish Governments to revive the Irish language and ensure that the *rights* of Irish speakers are protected” (emphasis added).<sup>66</sup> While Ireland’s ostensible commitment “to ensure the rights of Irish speakers” became the subject of criticism in later years, the latter reference serves as another useful example of the outward-facing political rhetoric that characterises the Irish State’s legal position on the Irish language.

For a language right or language legislative provision to be effective, such as a right or legislative provision to receive public services in a minority language, you need, clearly, someone else (for example a public service employee) to be able to respond and speak in the language in question. Along with financial resources and political commitment, the fulfilment of a language right or

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Publications, 2011), pp.195–209; D. Mac Giolla Chríost, *Jailtacht: the Irish language, symbolic power and political violence in Northern Ireland, 1972–2008* (Cardiff: University of Wales Press, 2012) and F. Mac Ionnrachtaigh, *Language, Resistance and Revival: Republican Prisoners and the Irish Language in the North of Ireland* (London: Pluto Press, 2013).

64. H. Kloss, *The American Bilingual Tradition* (Rowley, MA: Newbury House, 1977). For analysis of Kloss’ binary classification of language rights see A. Patten, “The Justification of Minority Language Rights” (2009) 17 (1) *The Journal of Political Philosophy* 102–128 at 108.

65. A. Patten, “The Justification of Minority Language Rights” (2009) 17 (1) *The Journal of Political Philosophy* 102–128 at 108.

66. Report submitted by Ireland pursuant to art.25 (1) of the Framework Convention for the Protection of National Minorities, ACFC/SR (2001) 006, p.18. In contrast to signature processes elsewhere in Europe, language did not form part of the signature process in Ireland but was instead linked primarily to the “advancement of justice and peace on these islands”. See ACFC/SR (2001) 006, p.5.

language legislative provision necessitates language capacity and competence. The language capacity aspect, discussed below, has proved deeply problematic for the effective fulfilment of the core legislative provisions of the OLA 2003. Language, by its very nature, needs a response. It needs another to actively engage and use the language of the person holding the right or availing him- or herself of the language legislative provision. Once language legislation, whether rights-based or not, has been put in place, effective fulfilment is determined, by and large, by the communicative and instrumental element of language and specifically the language competency of the one charged with delivery of the right or legislative provision.

It is in this context that Meital Pinto recognised that language rights are unique in the sense that they place an “onerous cultural burden” on the other.<sup>67</sup> In more recent scholarship, however, Pinto has sought to rebut claims about this unique nature,<sup>68</sup> suggesting instead that the unique features of language rights also subsist in the right to religious freedom.<sup>69</sup> On the cultural burden argument, Pinto has argued that language rights are not as onerous as they may initially seem.<sup>70</sup> They do not, she argues, require majority members to compromise their cultural identity.<sup>71</sup> While there are similarities between language rights and the right to religious freedom in terms of identity, ethnicity and cultural claims, there are, arguably, significant distinctions to be made in terms of practice and effective fulfilment and the implementation of the said rights. Language as a right or a legislative provision, particularly of a promotion orientated nature, is more culturally burdensome on the other than the right to religious freedom. Again, while it may be accepted that majority language speakers do not have to sacrifice their own cultural identity, they still need to learn and be competent in the minority language in order to be able to successfully deliver the language right or language legislative provision in question. The same does not apply to religion. By stating that all the “allegedly unique features of language rights subsist in the right to religious freedom as well”, Pinto, in this writer’s view, fails to fully acknowledge the instrumental and communicative aspect of language.<sup>72</sup> And, while agreeing with Pinto’s demand for a more purposive approach to language rights, this writer disagrees with the basis on which the argument is founded.<sup>73</sup>

Drawing on the work of Rogers Brubaker it can be said that religion is more self-sufficient than language, has a greater chance of self-reproducing and is more “inter-generationally robust”.<sup>74</sup> Religion does not require the

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67. M. Pinto, “Rights, Religious Freedom and Equality of Cultural Identity” (presented at the Twelfth Berlin Roundtables on Cultural Pluralism Revisited: Religious and Linguistic Freedoms (7–11 April 2010).

68. M. Pinto, “Taking Language Rights Seriously” (2014) 25 (2) *King’s Law Journal* 231–254 at 231.

69. Pinto, “Taking Language Rights Seriously” at 231.

70. Pinto, “Taking Language Rights Seriously” at 232.

71. Pinto, “Taking Language Rights Seriously” at 232.

72. Pinto, “Taking Language Rights Seriously” at 231.

73. Pinto, “Taking Language Rights Seriously” at 231.

74. R. Brubaker, “Language, religion and the politics of difference” (2013) 19 (1) *Nations and Nationalism* 1–207 at 12.

same level of engagement from the State—the other. As noted by Brubaker, “the intergenerational transmission of minority religions requires no state apparatus like a minority-language system”.<sup>75</sup> Moreover, religion does not require a particular political regime beyond the commitment to support the accommodation of religion, nor is it particularly costly.<sup>76</sup> Language, on the other hand, needs significant support to be able to survive and to self-reproduce. In terms of support, it is the instrumental and communicative aspect of language that makes the effective accomplishment and implementation particularly challenging.

It might be argued that the criticism of Pinto conflates and exaggerates the burden argument in view of the fact that all rights place a burden on another (primarily the State) and, further, that there is insufficient recognition of the extent to which “religion has tended to displace language as the cutting edge of contestation over the political accommodation of cultural difference”.<sup>77</sup> By way of response, it is necessary to underscore two points. First, with respect to the right to religious freedom, it is acknowledged that the European Court of Human Rights (“ECtHR”), in particular, has dealt with an extensive body of case law challenging curtailments and infringements to the accommodation of religious freedom across Europe.<sup>78</sup> It is further acknowledged that, when it comes to the specific instance of the accommodation of Islam, highly vexed and complex issues arise. In this regard it is conceded that arguments can be advanced to the effect that this also imposes a burden on the State. Nonetheless, beyond the highly mediated cases of contestation on religious grounds it is argued here that the accommodation of language on a practical day-to-day level is far more onerous and burdensome on the State—the other. To reiterate, Pinto’s view that all the “allegedly unique features of language rights subsist in the right to religious freedom as well” fails to fully acknowledge the communicative and instrumental nature of language. The second, but related, point is that the onerous cultural burden argument is drawn upon by way of specifically advancing and supporting this writer’s argument that a differing legal approach to language is needed *if* language rights and language legislative regimes are to be effective. With language, mere financial support will not suffice. Beyond the argument that all rights cost money,<sup>79</sup> language incorporates instrumental and communicative aspects that render the implementation of language rights or language legislative provisions more difficult and onerous in practice. Yet,

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75. Brubaker, “Language, religion and the politics of difference” at 10.

76. Brubaker, “Language, religion and the politics of difference” at 10.

77. Brubaker, “Language, religion and the politics of difference” at 1.

78. See for example *Leyla Şahin v Turkey* Application no. 44774/98; *SAS v France* Application no. 43835/11. See S. Berry, “A tale of two instruments: religious minorities and the Council of Europe’s rights regime” (2012) 30 (1) *Netherlands Quarterly of Human Rights* 10–39 and P. Bosset, “Mainstreaming religious diversity in a secular and egalitarian state: the road(s) not taken in *Leyla Şahin v Turkey*” in E. Brems, *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge: Cambridge University Press, 2012).

79. See more generally S. Holmes and C. Sunstein, *The Cost of Rights* (New York: W.W. Norton, 1999).



without that communicative burden on the other, the language right or language legislative provision remains nothing more than an empty gesture.

Where a State, such as Ireland, has long advocated for entitlement to promotion-orientated language guarantees and purports to guarantee language rights, it must work towards ensuring substantive equivalence in the delivery of those rights and language legislative provisions. What is required, according to the Supreme Court of Canada, is an “interpretive framework” to ensure that a true understanding of language rights and language legislative guarantees can be realised.<sup>80</sup> It is, then, disconcerting to note that the Supreme Court of Ireland appears to support a “dilution” in State obligations to the Irish language.<sup>81</sup> In the recent case of *Ó Maicín v Ireland*, an appeal on the question of whether a person has a right to be tried with a jury that would be in a position to hear evidence in the Irish language without translation was dismissed.<sup>82</sup> Mr Justice Clarke, speaking for the majority, accepted that “the [Irish] State has a constitutional obligation to respect the language wishes of a citizen who wishes to use Irish in their communications with the State or its agencies”,<sup>83</sup> but he went on to say that “it does not seem to me that the general obligation of the State can ... be put any higher than an obligation to ‘encourage’”.<sup>84</sup> The fact that the Irish State has a constitutional obligation (with respect to the Irish language) does not, he noted, “mean that ... there is an absolute obligation on the State”.<sup>85</sup> Mr Ó Maicín, it was held, does enjoy a constitutional right to conduct official business fully in Irish but that this right was “not absolute”.<sup>86</sup> Dissenting, Mr Justice Hardiman expressed his concern at this “dilution” and “writing down” of the well-established legal and constitutional status of the Irish language. He also raised concerns that this was done without the court having been asked to do so.<sup>87</sup> The majority judgment in *Ó Maicín* can, according to Ó Conaill, “be grouped together with other cases in recent years calling for judicial pragmatism on issues concerning law and language”<sup>88</sup> and runs counter to the interpretation of language rights by the Supreme Court of Canada.

More recently, in *Association des parents de l'école Rose-des-vents v British Columbia (Education)*<sup>89</sup> the Supreme Court of Canada called for the approach to s.23 of the Canadian Charter (addressing minority language education) to be

80. *R v Beaulac* [1999] 1 S.C.R. 768, para.21.

81. See further *Ó Maicín v Ireland* [2014] IESC 12, dissenting judgment from Hardiman J. See more generally discussion by Seán Ó Conaill, “The Irish language and the Irish legal system: 1922 to present” (Ph.D. Thesis Cardiff University, 2014). Available at [orca.cf.ac.uk/58843/1/2014oconailsPhd.pdf](http://orca.cf.ac.uk/58843/1/2014oconailsPhd.pdf) [Last Accessed 4 March 2016], Ch.3.

82. *Ó Maicín v Ireland* [2014] IESC 12.

83. *Ó Maicín v Ireland* [2014] IESC 12, para.3.5.

84. *Ó Maicín v Ireland* [2014] IESC 12, para.3.5.

85. *Ó Maicín v Ireland* [2014] IESC 12, para.3.6.

86. *Ó Maicín v Ireland* [2014] IESC 12, para.7.1.

87. *Ó Maicín v Ireland* [2014] IESC 12, dissenting judgment from Hardiman J.

88. S. Ó Conaill, “Judicial Pragmatism at the Expense of Language Rights: The *Ó Maicín* Decision” (2014) Commentary posted on the Constitutional Project UCC. This is available at [constitutionproject.ie/?p=309](http://constitutionproject.ie/?p=309) [Last Accessed 4 March 2016].

89. *Association des parents de l'école Rose-des-vents v British Columbia (Education)* [2015] SCC 21.

both “contextual and holistic”.<sup>90</sup> As in *Beaulac*, when assessing “substantive equivalence”, the court stated that a “purposive approach” requires a court to consider the educational choices available from the perspective of s.23 rights-holders.<sup>91</sup> On costs, the court held that “it is not appropriate for provincial or territorial governments to invoke issues of practicality or cost as part of the inquiry into equivalence”.<sup>92</sup> This statement on costs is particularly apt in the context of the reasoning given to conduct a review of the OLA in 2011.<sup>93</sup> Recent statements from the Committee on Economic, Social and Cultural Rights on Ireland’s Third Periodic Report also have resonance in this respect.<sup>94</sup> Despite acknowledging the “unprecedented economic and financial crisis” that Ireland experienced, it was noted by the Committee that many austerity measures were adopted during and after the economic crisis without proper assessments of their impact on economic, social and cultural rights.<sup>95</sup> The Committee recommended that Ireland review all the measures that have been taken, and are still in place, in response to the economic and financial crisis with a view to ensuring the enjoyment of economic, social and cultural rights.<sup>96</sup> Though discussions on the reform of the OLA was not at the centre of the 2015 Committee Report, the recommendations do have specific relevance to the law and language debate and should therefore inform any future re-evaluation of the OLA 2003.

The purpose of this section was to examine the unique nature of language as the object of a right or legislative provision. While accepting that language rights and language legislative provisions are particularly onerous and burdensome in nature, it was emphasised that that position was taken so as not to be dismissive of campaigns for language rights and language legislation but rather the opposite end—to demonstrate the absolute need for a differing, more purposive and contextual approach to language rights and language legislation in Ireland. Language rights and language legislative provisions can be enjoyed only if the linguistic “means” is provided. The extent to which the means is provided can be used as a barometer by which to consider the extent to which states actually accept the positive obligations arising from language rights and language legislative regimes. Where states fail to take positive action to fulfil language rights and language legislative provisions adequately, the regimes remain illusory and lack substance. They merely amount to symbolic

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90. *Association des parents de l'école Rose-des-vents v British Columbia (Education)* [2015] SCC 21, para.39.

91. *Association des parents de l'école Rose-des-vents v British Columbia (Education)* [2015] SCC 2, para.35.

92. *Association des parents de l'école Rose-des-vents v British Columbia (Education)* [2015] SCC 21, para.46.

93. Government of Ireland, *Towards Recovery: Programme for National Government 2011–2016*, An Ghaeilge agus an Ghaeltacht, pp.59–60.

94. E/C.12/IRL/CO/3: Committee on Economic, Social and Cultural Rights in its concluding observations on the third periodic report of Ireland Adopted by the Committee at its fifty-fifth session (1–19 June 2015).

95. E/C.12/IRL/CO/3, para.11.

96. E/C.12/IRL/CO/3, para.11: recommendation (a).

recognition and vacuous rhetoric as opposed to the delivery in actual practice of language services for the relevant language speakers in question.

### THE OFFICIAL LANGUAGES ACT 2003: FURTHER EVIDENCE OF ANTIPATHY AND PARADOX

Broadly speaking, there are two types of language legislation that exist: rights-based and discretionary-based. Colin Williams has described Ireland's legislative approach under the OLA 2003 as an amalgamation of both.<sup>97</sup> The OLA 2003 does provide some specific rights protection such as the right to use the Irish language in the Houses of the Oireachtas (Houses of Parliament)<sup>98</sup> but by and large the approach adopted in the Act can be described as discretionary in nature. Section 8 of the Act, by way of further example, refers to the fact that a person "may use either of the official languages" and that "the person will not be placed at a disadvantage" with respect to the use of the Irish language in court proceedings. However, it does not actually refer specifically to the *right* to use the Irish language in court proceedings.<sup>99</sup> To that end, the approach adopted under the OLA 2003 is similar to the legislative approach formerly adopted under the Welsh Language Act 1993<sup>100</sup> and lies counter to the rights-based approach endorsed under Canada's Official Languages Act 1988.<sup>101</sup> What makes the lack of a rights focus in the Irish context distinguishable is the constitutional recognition of the Irish language as the "first" official language of Ireland. Notwithstanding the fact that Art.8 does not read as a right per se, one might have assumed, in the situation where constitutional recognition is given to a language as the first official language of a State, that the intention under subsequent legislative protection would have been to provide for a more robust rights-based regime.

It is notable that the precursor to the OLA 2003, the Official Languages (Equality) Bill 2002, did provide for such a regime and drew heavily on the legislative approach adopted in Canada. Specifically, the preamble to the 2002 Bill declared that the purpose of the Bill was "to promote *equality* of status and *equal rights* and privileges" (emphasis added).<sup>102</sup> But, as noted by Riggs, Ó Laoire and Georgiou, the OLA 2003 serves to illustrate that the government of the day sought to move towards a discretionary legislative approach rather than one that granted specific individual and substantive language rights to Irish speakers.<sup>103</sup> Given the status of the Irish language as the first official

97. See further C. Williams, "Linguistic Diversity and Legislative Regimes" in *Lenguas Minoritarias en la Administración* (Vitoria-Gasteiz: Parlamento Vasco, 2010), pp.23–50.

98. OLA 2003 s.6.

99. OLA 2003 s.8.

100. Welsh Language Act 1993 Ch.38.

101. Official Languages Act (R.S.C. 1985, c.31 (4th Supp.)), [1988, c.38, assented to 28 July 1988].

102. Official Languages (Equality) Bill 2002, Bill No. 42 of 2002, Preamble.

103. C. Riggs, M. Ó Laoire and V. Georgiou, "These are the People you Need to Talk to: The Role of Non-State Organisations in International Policy transfer to Ireland's

language of Ireland under Art.8, concerns were raised in parliamentary debate about the reference to “equality” in the Bill. Members of the Dáil and Seanad questioned how the principle of equality could be reconciled with the position of the Irish language as the “first” official language of Ireland provided for in the Constitution.<sup>104</sup> Legislation recognising the Irish language as “equal to” the English language represented, it was argued, a demotion of the status of the language as the first and official language. Niamh Nic Shuibhne made the point, at the time, that the equality reference, rather than redressing language problems, would in fact perpetuate another level of inequality.<sup>105</sup> No amount of formalistic “equality labelling”, she argued, could mask the fact that English and Irish are entirely unequal languages.<sup>106</sup> On the advice of the Attorney General the reference to equality was removed from the title of the Bill as it was deemed to be unconstitutional.<sup>107</sup> During the Committee Stage, Minister Ó Cúiv pointed out that the word “equality” would be deleted “*ar fhaitíos na míthuisceanna gur céim síos don nGaeilge a bheadh i gceist*” (for fear that there would be a misunderstanding that this was a step down for the Irish language).<sup>108</sup>

Arguably, the reference to and focus on equality would have strengthened the status of the Irish language in terms of de facto language rights. If a language is *equal* to another, and in this case the dominant spoken language of Ireland, it places, as a consequence, that minority language in a stronger legal position. This writer disagrees with the argument made by Nic Shuibhne that the reference to equality would have further perpetuated inequality. Recognising equality between the Irish language and the English language would have placed a greater duty on the Irish State to work towards achieving that equality in practice.<sup>109</sup> Notwithstanding the constitutional position of the Irish language in Art.8, the distinct move away from an equality and rights focus within the progression from Bill to Act signified an aversion towards recognising language as a right. By Committee Stage the vision

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Official Languages Act 2003”, paper submitted to XIV International Policy Learning and Transfer in Public Administration Conference, The Crisis: Challenges for Public Management, University of Berne, 7–9 April 2010.

104. Seanad Debates, Official Languages (Equality) Bill 2002, Committee Stage: 172 *Seanad Éireann Debates* 9, 8 April 2003. See further Official Languages Bill 2002: Second Stage, 567 *Dáil Éireann Debates* 3, Thursday 22 May 2003.

105. N. Nic Shuibhne, “Eighty Years A’ Growing—The Official Languages (Equality) Act 2002” (2002) 13 *The Irish Law Times* 198–203 at 199.

106. Nic Shuibhne, “Eighty Years A’ Growing—The Official Languages (Equality) Act 2002”.

107. Dáil Debates, Official Languages (Equality) Bill 2002, Éamon Ó Cúiv, Committee Stage: 172 *Seanad Éireann Debates* 9, 8 April 2003.

108. Dáil Debates, Official Languages (Equality) Bill 2002, Éamon Ó Cúiv, Committee Stage: 172 *Seanad Éireann Debates* 9, 8 April 2003.

109. It is also worthy of note, on the equality point, that the Constitutional Review Group in 1996 recommended that Art.8 be replaced by the following provision:

8.1 The Irish language and the English language are the two official languages.

8.2 Because the Irish language is a unique expression of Irish tradition and culture, the State shall take special care to nurture the language and to increase its use.

See further, *Report of the Constitution Review Group* (Dublin: Stationery Office, May 1996).

underpinning the Bill had become one of promotion as opposed to equality: “to promote the *use* of Irish for official purposes within the state”.<sup>110</sup> This shift in approach further epitomised the level of disconnect in the Irish State’s legal association to the Irish language. Ultimately, the approach adopted represented a discretionary legislative approach as opposed to a rights-based approach and with that an attempt to limit the acceptance of positive obligations on the state. Yet, at the same time, the shift in approach placed the burden of promoting Irish language *use* on law as an instrument of language policy and change. As discussed below, this vision of promotion was sought without any sustained and streamlined commitment given to ensuring an effective interpretive and linguistic infrastructure within which that *promotion* could actually take place.

### THE FAILED PROMISE OF THE LANGUAGE SCHEME SYSTEM<sup>111</sup>

As stated in the introduction, despite positive developments in terms of the visibility of the Irish language in daily life, the core objective of the OLA 2003 to promote increased *use* of the Irish language for official purposes has not been met. Since enactment, difficulties with effective implementation of the language scheme system (the core provision of the Act) have arisen as a result of two specific factors. One consists in the significant delay in the confirmation of language schemes by the Department of Arts, Heritage and the Gaeltacht and the other in the absence of a suitable linguistic infrastructure within which public bodies can deliver the language schemes to which they have committed.

The legislative details of the language scheme system are set out in ss. 11–19 of the Act. Section 11 provides that the Minister (for Arts, Heritage and the Gaeltacht) may write (give “notice”) to Irish public bodies (around 650<sup>112</sup>) requiring each body to prepare and present to him or her a language scheme for confirmation. The language scheme must detail the language services that each body proposes to provide exclusively in the Irish language, those exclusively in the English language, and those bilingually.<sup>113</sup> Notably, the reference to “may” allows for ministerial discretion from the outset and epitomises the discretionary approach that was sought under the OLA. Following receipt of a notice, s. 13 requires that a public body shall publish its intention to draft a scheme and ensure that an adequate number of staff are competent in the Irish language in order to fulfil its demands. Once the language scheme is confirmed by the Minister<sup>114</sup> it is the duty of the public body to proceed and to implement the scheme.<sup>115</sup> Schemes remain in force for three years and thereafter need to

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110. OLA 2003, Preamble.

111. Here, I draw on the view put forward in M. Paz, “The Failed Promise of Language Rights: A Critique of the International Language Rights Regime” (2013) 54 (1) *Harvard International Law Journal* 157–218.

112. OLA 2003 First Schedule.

113. OLA 2003 s. 11(1)(a).

114. OLA 2003 s. 14(1).

115. OLA 2003 s. 18.

be renewed.<sup>116</sup> The intention is, or at least was, that this renewal process would secure, over time, a significant improvement in the level of public services available through the Irish language.

Wilson McLeod<sup>117</sup> argues that one of the biggest shortcomings of the language scheme system in Ireland is the fact that responsibility for the approval of language schemes rests with the Minister responsible for Irish language affairs rather than a dedicated language agency or body such as *Bòrd na Gàidhlig* in Scotland.<sup>118</sup> Moreover, Ó Flatharta notes that responsibility resting with the Minister and Department of Arts, Heritage and the Gaeltacht results in a “start-stop approach” as changes in the political system occur.<sup>119</sup> Annual Reports from the Office of the Language Commissioner support the observations made by both McLeod and Ó Flatharta. In the Annual Report from 2011 it was noted that only one language scheme had been approved.<sup>120</sup> Commenting on the findings that year, the former Language Commissioner Seán Ó Cuirreáin noted that “matters have undoubtedly been allowed to slide out of control” and the language scheme system “appears now to have failed completely”.<sup>121</sup> There is, he added, “no secure or stable basis to the system”.<sup>122</sup> Following greater commitment by the Department of Arts, Heritage and the Gaeltacht in recent years there has been an increase in the number of language schemes confirmed since 2013 with 21 schemes being approved in 2014.<sup>123</sup> Despite this increase, however, the average time in which schemes have expired has increased from 32 to 50 months.<sup>124</sup> By the end of 2014, 53 language schemes had expired.<sup>125</sup> At the time of writing, the Department’s own language scheme system had expired.<sup>126</sup> This, needless to say, is indicative of the weakness in, and lack of commitment to, the language scheme system.

With the language schemes that *have* been approved the primary difficulty in effective fulfilment and implementation is the absence of a suitable linguistic infrastructure and language competency within public bodies.<sup>127</sup> In December 2013, when Seán Ó Cuirreáin announced his resignation as the Irish Language

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116. OLA 2003 s.14(3).

117. W. McLeod, “Best practice in minority provision”, Paper submitted to Tóstal na Gaeilge 2012 (Conference), 14 January 2012, p.4.

118. Section 1 of the Gaelic Language (Scotland) Act 2005 provides for statutory recognition for the language development body *Bòrd na Gàidhlig* and outlines the range and scope of the duties of the Bòrd.

119. P. Ó Flatharta, “Appendix 2: Recent developments concerning implementation of language legislation in Ireland” in P. Ó Flatharta, S. Sandberg and C. Williams, *From Act to Action: Implementing Language Legislation in Finland, Ireland and Wales* (Dublin: Fiontar, 2014), p.67.

120. An Coimisinéir Teanga, Annual Report 2011 (Oifig an Choimisinéara Teanga, 2012).

121. An Coimisinéir Teanga, Annual Report 2011, p.6.

122. An Coimisinéir Teanga, Annual Report 2011, p.6.

123. An Coimisinéir Teanga, Annual Report 2014, pp.20–22.

124. An Coimisinéir Teanga, Annual Report 2014, p.20.

125. An Coimisinéir Teanga, Annual Report 2014, p.20.

126. S.T. Ó Gairbhí, “Scéim teanga Roinn na Gaeltachta imithe in éag le naoi mí, ach ceann nua ar na bacáin” (Tuirisic, 8 Feabhra 2016).

127. An Coimisinéir Teanga, speaking at the Houses of the Oireachtas Joint Committee on Public Service Oversight and Petitions, 4 December 2013.



Commissioner, due to the failure of the Irish State to fulfil its commitments under the OLA, he highlighted this point.<sup>128</sup> He stated that “the absence of staff with competence in both official languages of the State remains one of the main factors restricting state bodies in their delivery of services to the public”.<sup>129</sup> While not advocating a return to the compulsory Irish language pre-requisite for employment in the Irish public sector,<sup>130</sup> drastic action is needed if one-to-one communicative language services in the public sector are ever to be effective.<sup>131</sup> Ó Flatharta, Sandberg and Williams, in comparing language legislative regimes in Finland, Ireland and Wales under the comprehensive From Act to Action project note that states have “to ensure continuous availability of bilingual personnel”.<sup>132</sup> Notwithstanding the fact that the instrumental aspects of language place an onerous burden on the other, it is the case that without that burden language rights and language legislative provisions remain hollow and futile. Where a state, as noted by Woehrling, accepts an obligation to protect a national language, it recognises the legitimacy of the wishes of the speakers to use the language in their relations with public bodies and undertakes to respect those wishes.<sup>133</sup> Providing Irish language speakers with the linguistic infrastructure to use the Irish language in their relations with Irish public bodies “enables the exercise of their citizenship rights and civic duties in a manner that is consistent with their mode of expression”.<sup>134</sup>

It would be remiss to say that Ireland is alone when it comes to experiencing difficulties in the successful realisation of core provisions of its language legislation, particularly so with respect to language competency.<sup>135</sup> Even in Canada, where there is a long history of providing bilingual language services under a strong rights-based framework of legislation, difficulties arise on a

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128. *The Irish Times*, “Commissioner resigns over Government failures on Irish” 5 December 2013. As noted by P. Ó Flatharta, “this was the first time a Commissioner/Ombudsman of the state resigned and his resignation sparked pro-Irish language protests” (P. Ó Flatharta “Language Schemes—a useful policy tool for language planning?” (2015) 4 *Current Issues in Language Planning* 378–391.
  129. An Coimisinéir Teanga, speaking at the Houses of the Oireachtas Joint Committee on Public Service Oversight and Petitions, 4 December 2013.
  130. In 1925, knowledge of the Irish language became a pre-requisite for those entering the general grades of the civil service as part of a revivalist language policy post-1922, but in 1974 that requirement was abolished by the Fine Gael and Labour Coalition Government. See further discussion within 276 *Dáil Debates*, 5 December 1974, 7.
  131. An Coimisinéir Teanga, *Review of the Official Languages Act 2003* (July 2011), p.15.
  132. P. Ó Flatharta, S. Sandberg and C. Williams, *From Act to Action: Implementing Language Legislation in Finland, Ireland and Wales* (Dublin: Fiontar, 2014), p.67.
  133. J.M. Woehrling, *The European Charter for Regional or Minority Languages: A Critical Commentary* (Council of Europe Publishing, 2005), pp.178–179.
  134. J.M. Woehrling, *The European Charter for Regional or Minority Languages: A Critical Commentary*, pp.178–179.
  135. I. Ulasiuk, “Language Rights in Relations with Public Administration: European Perspectives” (2011) 18(1) *International Journal on Minority and Group Rights* 93–113; L. Cardinal, “Language Regimes in Canada and in Quebec: From Competition to Collaboration?” (2012) Recode Working Paper Series (Online) No. 2 (2012): <http://www.recode.info/wp-content/uploads/2013/02/Cardinal-Linda-2012-RECODE.pdf> [Last Accessed 7 April 2016].

daily basis with respect to language capacity in the delivery of French language services.<sup>136</sup> But, at least in Canada, language is recognised as a valuable economic resource and commodity in terms of public sector recruitment and commitments are made at a federal level to help correct gaps between legislative policy and practice. In particular, commitment to the “active offer” principle in the delivery of language services is to be commended, as is the role of the Supreme Court of Canada, which has been instrumental in persuading the federal government to recognise the legitimacy of language rights as positive and purposeful and not merely as passive and negative rights. An amendment to the Canadian Official Languages Act 1988 in 2005<sup>137</sup> demonstrates this point well, as does the adoption of the Language Skills Act 2013.<sup>138</sup> For a person to qualify for posts within the federal government, the 2013 Act requires that one must be competent in (be able to speak and understand) both official languages.<sup>139</sup> Though the remit of the Act is limited to senior posts, and some will argue that it was a knee jerk reaction to public outcry at the appointment of a unilingual Auditor General in 2011, this is a positive legislative measure and does seek to place emphasis on the “means” to fulfilling commitments to official bilingualism in Canada.

Given the instrumental and communicative nature of language, language competency within the public sector is essential in order to achieve effective fulfilment of language legislation. Failings in the Irish language scheme system have revealed a stark vulnerability in the linguistic infrastructure of the public sector but, pointedly and more generally, an antipathy in the Irish State’s approach to language guarantees. There is a considerable gap between political rhetoric and practical implementation. The question, moving forward, is what can, and should, be done to bridge the gap. Until 1974 there was a compulsory requirement to have Irish language competency to secure a post in the public sector. As a corollary there was a greater incentive to use and become proficient in the Irish language. When this compulsory requirement ended, a bonus marks system for Irish language proficiency in the public sector was introduced. In effect, the bonus marks system, as highlighted in investigations by the former Language Commissioner in 2011, was never properly implemented.<sup>140</sup> More recently, in October 2013, the bonus marks system was replaced with a

136. See further L. Cardinal and C. Williams, “Bridging the Gap between the Politics of Recognition and the Politics of Identity: Language Service Delivery in Ontario and Wales”, unpublished memo [copy on file].

137. An Act to amend the Official Languages Act (promotion of English and French) S.C. 2005, c. 41. It provides that: “Every federal institution has the duty to ensure that positive measures are taken for the implementation of the commitments under subsection (1)”.

138. Language Skills Act 2013 Ch.36.

139. Language Skills Act 2013 s.2. It reads “[a]ny person appointed to any of the following offices must, at the time of his or her appointment, be able to speak and understand clearly both official languages ...”.

140. Formal Investigation of Department of Social Protection (Oifig an Coimisinéara Teanga, 23 June 2011), pp.1–2. The investigation concerned the failure of the Department of Social Protection to award bonus marks for Irish language competency in promotion processes in two separate cases.

competency-based system.<sup>141</sup> This competency-based system aims to “enhance the capacity of staff in the civil service and certain public service organizations to meet their Irish language obligations and requirements under legislation”.<sup>142</sup> In line with this new approach, all departments and public offices, as part of their Workforce Planning in 2015, have been asked to identify specific posts and areas which require fluency in the Irish language.<sup>143</sup> Under the new system it is intended that a sub-panel of functional bilinguals will be formed, comprising up to six per cent of the public sector. The objectives of the new system have not escaped criticism. The new system was described by the former Language Commissioner as “ill-conceived” and, in his view, would also fail,<sup>144</sup> whilst Conradh na Gaeilge has called for a greater commitment to ensure a higher percentage of functional bilinguals in the public sector.<sup>145</sup> The aim of securing a panel of bilingual Irish language speakers in the public sector is to be commended, but significant questions still remain in terms of the extent to which actual competency in the Irish language can be guaranteed. Closer scrutiny of the new competency-based system reveals that the substance of the approach is again on language training. This is to be welcomed, but equally it draws attention to the scholarship of John Walsh, who has highlighted the dominant ideology in Ireland of “a few words will do” when it comes to competency and language-based training in the public sector.<sup>146</sup> It is essential to move beyond this ideology and to provide real incentives in the public sector to entice language-competent graduates and employees.<sup>147</sup> In Slovenia, by way of example, knowledge of a minority language is rewarded financially with a six per cent salary increase for active use of a minority language and three per cent for passive knowledge of a minority language.<sup>148</sup>

As regards improvement of public service delivery in Irish it is worth noting that the last Minister for Arts, Heritage and the Gaeltacht invited recommendations on this specific issue as part of the open policy debate on The 20-Year Strategy for the Irish Language 2010–2030.<sup>149</sup> Though this appeared

141. Department of Public Expenditure & Reform, *Service Level Agreement on the provision of Irish language training and proficiency assessment to civil service Departments/Offices between the Department of Public Expenditure & Reform and the Department of Arts, Heritage & the Gaeltacht* (2013).

142. *Service Level Agreement on the provision of Irish language training and proficiency assessment to civil service*, p.1.

143. Department of Public Expenditure & Reform, *Progress Report on the 20-Year Strategy for the Irish Language 2010 to 2030: July 2013–September 2014*, p.1.

144. An Coimisinéir Teanga, speaking at the Houses of the Oireachtas Joint Committee on Public Service Oversight and Petitions, 4 December 2013, p.4.

145. For more see Conradh na Gaeilge [cnag.ie/ga/feachtais/feachtais-reatha/bille-na-dteangacha-oifigiúla.html](http://cnag.ie/ga/feachtais/feachtais-reatha/bille-na-dteangacha-oifigiúla.html) [Last Accessed 3 March 2016].

146. J. Walsh, “Language policy and language governance: a case-study of Irish language legislation” (2012) 11 (4) *Language Policy*, 323–341.

147. Ulasiuk, “Language Rights in Relations with Public Administration: European Perspectives” at 93–113.

148. ECRML (2004) 3; Report of the Committee of Experts on the application of the ECRML in Slovenia, Initial Monitoring Cycle, para.124.

149. Department of Arts, Heritage and the Gaeltacht, *Open Policy Debate on The 20-Year Strategy for the Irish Language 2010–2030*. See further detail at: [www.ahg.gov.ie/gaeltacht/20-year-strategy-for-the-irish-language-2010-2030/open-policy-debate-](http://www.ahg.gov.ie/gaeltacht/20-year-strategy-for-the-irish-language-2010-2030/open-policy-debate-)

on the face of it to be positive and to offer the opportunity for dialogue and meaningful engagement on language policy, it must be noted that the discussion document made no specific reference to the OLA. It must, therefore, be asked whether this open policy forum was merely another attempt to hide behind the “mask of piety”; one that involves being seen to be taking action while, equally, using the forum as a means within which to delay parliamentary debate on reform of the OLA before the dissolution of the 31st Dáil.<sup>150</sup>

### THE OFFICIAL LANGUAGES (AMENDMENT) BILL 2014: ANOTHER MISSED OPPORTUNITY?

The decision to reform the OLA was first announced in March 2011 as part of the Programme for Government 2011–2016.<sup>151</sup> At the time, the Government announced that a review of the OLA 2003 would be carried out “to ensure expenditure on the Irish language was best targeted towards the development of the Irish language”.<sup>152</sup> November of that year saw the publication of a consultation document entitled *Review of the Official Languages Act 2003* with submissions invited from interested parties up until 31 January 2012.<sup>153</sup> Given the difficulties already noted with effective implementation of core provisions, as discussed above, the decision to review the Act was a welcome one.<sup>154</sup> Even so, the terms of reference clearly indicated that the context for reform was one of cost-cutting and not one of purposive and holistic reform.

Notwithstanding that the consultation process concluded at the end of January 2012, it took the Department of Arts, Heritage and the Gaeltacht until April 2014 to publish its findings.<sup>155</sup> In summary, the consultation process revealed that there was a significant demand and support for Irish language services in the public sector with almost all respondents (97 per cent) indicating that it was important that public bodies provide services in the Irish language and that the Irish language be used by public bodies on signage, stationery, advertising and oral announcements.<sup>156</sup> Accompanying the findings of the consultation process

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*on-the-20-year-strategy-for-the-irish-language-2010-2030/* [Last Accessed 4 March 2016].

150. See further S.T. Ó Gairbhí, “Amhras ann an ndéanfar aon leasú ar Acht na dTeangachs óifigiúla le linn shaolré an Rialtais seo” (Tuairisc 3 Iúil 2015/3 July 2015); S.T. Ó Gairbhí, “Géarghá le neartú cearta teanga i gcónaí”, a deir an Coimisinéir, agus é admhaithe ag an Taoiseach nach bhfoilseofar reachtaíocht teanga” (Tuairisc 25 Eanáir 2016).

151. Government of Ireland, *Towards Recovery: Programme for National Government 2011–2016*.

152. Government of Ireland, *Towards Recovery: Programme for National Government 2011–2016*, An Ghaeilge agus an Ghaeltacht, pp.59–60.

153. Department of Arts, Heritage and the Gaeltacht, *Review of the Official Languages Act 2003* (3 November 2011).

154. V. Ní Drisceoil, “Irish language rights in the era of austerity” (2012) 30 *Irish Law Times*, 72–76.

155. Department of Arts, Heritage and the Gaeltacht, *Review of the Official Languages Act 2003* (April 2014), p.4.

156. Department of Arts, Heritage and the Gaeltacht, *Review of the Official Languages Act 2003* (April 2014), p.4.

was the publication of the Heads of the Official Languages (Amendment) Bill 2014 but, in all of this, there was little regard paid to the submissions made in the consultation process. In line with government policy, the Heads of the Bill were then referred to the Joint Committee on Environment, Culture and the Gaeltacht which published a report in February 2015.<sup>157</sup> As of January 2016, the recommendations of the Joint Committee continued to be evaluated by the Department and the Bill remained on the legislative “A List” scheduled for parliamentary debate.<sup>158</sup>

In broad terms, the Heads of Bill denoted a distancing and limiting of State obligations. With specific reference to the language scheme system, Head 5 provided for an amendment to s.11 of OLA 2003 which would allow the Minister to withdraw a notice to a public body to produce a language scheme. This proposal, according to the explanatory note, “is necessary” as there is no current provision in the Act to allow for withdrawal.<sup>159</sup> While this may be the case, such an amendment would offer the relevant Minister even further flexibility and a means within which to limit, even further, state obligations within what Ó Flatharta has described as the “quasi-contract” nature<sup>160</sup> of the language scheme system. The Joint Committee on Environment, Culture and the Gaeltacht disagreed with the provisions under Head 5 and recommended that it is the Language Commissioner who should be involved in the process of withdrawing any notices.<sup>161</sup> Head 7 provides for an amendment to s.14 of OLA and calls for “an increase from 3 to 7 years for the period during which a language scheme remains in force”.<sup>162</sup> Again, this proposal aims to lessen the burden on the State in terms of drafting, agreeing and confirming language schemes. The Joint Committee also disagreed with this amendment and, by way of response, recommended that the maximum period during which a public language scheme remains in force should be 4 years and not 7 years.<sup>163</sup>

On the specific issue of language competency and recruitment, Head 6 envisages a new subs.13(2), in line with the decision of the government to replace the bonus system with a competency-based system, specifying the posts within public bodies that require Irish language competency. This proposal

157. Joint Committee on Environment, Culture and the Gaeltacht, *Report of the Joint Committee on the General Scheme of the Official Languages (Amendment) Bill 2014*, 27 January 2015.

158. Government Legislation Programme Autumn Winter Session 2015. See more at: [www.taoiseach.ie/eng/Taoiseach\\_and\\_Government/Government\\_Legislation\\_Programme/#sthash.epCRZvPZ.dpuf](http://www.taoiseach.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/#sthash.epCRZvPZ.dpuf) [Last Accessed 4 March 2016].

159. Heads of Official Languages (Amendment) Bill 2014, p.7. Available at [www.ahg.gov.ie/app/uploads/2015/09/heads-of-official-languages-amendment-bill-2014.pdf](http://www.ahg.gov.ie/app/uploads/2015/09/heads-of-official-languages-amendment-bill-2014.pdf) [Last Accessed 4 March 2016].

160. Ó Flatharta, “Language Schemes—a useful policy tool for language planning?” (2015) 16(4) *Current Issues in Language Planning*, 1–14.

161. Joint Committee on Environment, Culture and the Gaeltacht, *Report of the Joint Committee on the General Scheme of the Official Languages (Amendment) Bill 2014*, p.3 and pp.6–7.

162. Heads of Official Languages (Amendment) Bill 2014, p.9.

163. Joint Committee on Environment, Culture and the Gaeltacht, *Report of the Joint Committee on the General Scheme of the Official Languages (Amendment) Bill 2014*, pp.3 and 8.

is to be commended but, as highlighted above, there are also limitations within the new competency-based system. Referring to the Department of Education and Skills, the former Language Commissioner noted that under the new competency-based system it would take up to 28 years to increase the level of competency from 1.5 per cent to 3 per cent.<sup>164</sup> The Joint Committee recommended that all public bodies should work towards ensuring that they have a minimum of 10 per cent of staff with language competency.<sup>165</sup> It is noteworthy that the Committee also recommended that the government decision to revoke the policy of awarding bonus marks for proficiency in Irish in civil service competitions should be reviewed, as should the policy of providing scholarships to public servants to attend Irish language courses in Gaeltacht areas.<sup>166</sup> The proposals for reform, as set out in the Heads of Bill, are about limiting State obligations with respect to the Irish language. They represent, to draw on the words of Mr Justice Hardiman in *Ó Maicín*, a dilution in State obligation. They do little to inspire and display a reluctance to accept positive obligations as they relate to the provision of Irish language services in the public sector.

#### THE NEED FOR A RECONCEPTUALISED DEBATE REMAINS

Notwithstanding continued uncertainty, at the time of writing,<sup>167</sup> as to who will form the next government and the implications which this has for the fate of the Heads of the Official Languages (Amendment) Bill 2014, the need for a reconceptualised debate about the Irish State's legal relationship with the Irish language remains. Arguably, a change in government in 2016 will provide a context within which that debate can take place. As noted by Colin Williams, the Irish State has for almost a century "struggled with identifying what precisely its relationship is to Irish, both as a symbolic and as a communicative expression of its national identity".<sup>168</sup> The time has come, not least during this period of national reflection on the centenary of the 1916 Easter Rising, to identify what precisely that relationship is. Drawing together the observations made in this article concerning antipathy, paradox and disconnect, a number

164. An Coimisinéir Teanga, speaking at the Houses of the Oireachtas Joint Committee on Public Service Oversight and Petitions, 4 December 2013, p. 4.

165. Joint Committee on Environment, Culture and the Gaeltacht, *Report of the Joint Committee on the General Scheme of the Official Languages (Amendment) Bill 2014*, p.28.

166. Joint Committee on Environment, Culture and the Gaeltacht, *Report of the Joint Committee on the General Scheme of the Official Languages (Amendment) Bill 2014*, p.7.

167. The General Election 2016 took place on 26 February. As of 23 March 2016, no decision has been made as to who will form/lead the next government in Ireland. Fianna Fáil have, however, indicated support for the appointment of a Senior Minister for Irish language and Gaeltacht Affairs. For more see M. Ó Coimín, "Aire sinsearach Gaeltachta mar chuid d'aon mhargadh rialtais a dhéanadh Fianna Fáil" (Tuairisc, 21 Márta 2016).

168. C. Williams, "Perfidious hope: the legislative turn in official minority language regimes" (2013) 23 (1) *Regional and Federal Studies* 101–122 at 111.



of key recommendations can be made within which the legal approach to the Irish language, bolstered by a more complete, contextual and more purposive conception of equality, can be accommodated. The recommendations address three key areas: Art.8 of the Irish Constitution, the position of the Irish language in Europe and language legislation.

Recognition of the Irish language as the “first” official language of Ireland has, in effect, been the root cause of much of the difficulty, challenge and paradox that has ensued, and continues to ensue, in the Irish State’s complex relationship with the Irish language. In acknowledging that decisions to reform the Irish Constitution should not be made lightly it is argued here that the time has now come to reconsider the positioning and status of Art.8. Arguably, a referendum would provide the best opportunity for Irish citizens to consider and deliberate on what the Irish language means to the Irish nation and what role the Irish State should play in safeguarding it. In that respect, the recommendations made by the Constitutional Review Group (CRG) in 1996 provide a useful starting point. In rejecting the primacy given to the Irish language in the 1937 Constitution, the CRG recommended that Art.8 be replaced with the following provision:

8.1 The Irish language and the English language are the two official languages.

8.2 Because the Irish language is a unique expression of Irish tradition and culture, the State shall take special care to nurture the language and to increase its use.<sup>169</sup>

At the time, the CRG reasoned that the changes would reflect the current socio-linguistic reality more accurately and ensure a more active approach to the Irish language rather than a “purely aspirational” formulation.<sup>170</sup> The CRG recognised “the intention to give special recognition to the Irish language”<sup>171</sup> and, while respecting this, argued that this might be better achieved by including a positive provision in the Constitution to the effect that the State shall care for, and endeavour to promote, the Irish language as a unique expression of Irish tradition and culture. Though the recommendations made by the CRG can be criticised<sup>172</sup> on a number of grounds, they do still have merit. In particular, the attempt to highlight the disconnect between the aspirational nature of Art.8.1 and the duties of the Irish State can be commended.

Consistent with the approach that has been advocated in this article, the constitutional status of the Irish language should be framed as a positive provision and provide greater clarity with respect to the duty of the Irish State towards the Irish language. An amendment to Art.8 should be underpinned

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169. *Report of the Constitution Review Group* (Dublin: Stationery Office, May 1996). The CRG did not make any comment on Art.8.3.

170. *Report of the Constitution Review Group*, p.11.

171. *Report of the Constitution Review Group*, p.11.

172. N. Nic Shuibhne, “State Duty and the Irish Language” (1997) 4 (1) *Dublin University Law Journal* 33.

by a vision of equality, equality of status, and equal rights. Whatever the outcome, the opportunity for real debate on the status and positioning of the Irish language in the Irish Constitution would, it is submitted, pave the way for greater clarity on the actual rights of Irish language speakers and the duty on the Irish State to give effect to those rights.

Reform of Art.8 would in turn provide the necessary context within which debate as to the status of the Irish language as an official EU language could take place as well as debate on Ireland's positioning with respect to regional instruments such as the ECRML. As argued for above, this article has sought to demonstrate that the reluctance to sign the ECRML grew out of a fear that recognition under the Charter would negatively impact the campaign to grant the Irish language official EU language status. The Irish language did become an official EU language in 2007 but has remained under derogation since then. Ireland is simply not in a position, as regards Irish lawyer linguistic competency, to deliver on the requirements of official language status in the EU. Notwithstanding the hard fought campaign of Stádas and the symbolic status of the Irish language as an official language of the EU, it could be argued that Ireland should rethink its official language positioning in the EU. One outcome of such a rethink is that the financial revenue directed towards the training of Irish lawyer linguists might be better directed towards the provision of domestic language services in the public sector *in* Ireland.

Looking to the ECRML it may be argued that the debate on Art.8 and EU language status paves the way for a reconsideration of the position of the Irish language under the Charter. By declaring the Irish language a minority or lesser-used official language for the purpose of signature and ratification, it would prove constructive in terms of indicating the reality of the Irish language situation in Ireland. Signature and ratification would also indicate greater support, at a regional level, for the protection and promotion of minority and regional languages across Europe. Signature and ratification of the Charter would arguably accommodate a more holistic, contextual and purposive approach to language policy in Ireland. Ratification would ensure independent monitoring across not only administrative domains but also in education, media and cultural activities and facilities.

As for language legislation and reform of the OLA, the overarching recommendation is that language legislative provisions should be interpreted purposively. To draw on the words of Justice Bastarache in *R v Beaulac*, the “means” must be provided within which the legislative provisions can be effectively fulfilled. The language scheme system, forming as it does the centre piece of the OLA, has not worked well and needs to be radically overhauled or, in the alternative, replaced with a standards system as proposed by the former Language Commissioner.<sup>173</sup> Under the standards system, statutory regulations would be imposed on public bodies in line with a classification band (categories A, B, C, etc.) The classification would be determined in

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173. *Review of the Official Languages Act 2003—Report by An Coimisinéir Teanga under Section 29 of that Act: Commentary on the practical application and operation of provisions of that Act* (Oifig an Choimisinéara Teanga, July 2011).

accordance with the range of functions provided by the said public body as well as its level of interaction with the public. The classification will determine the level of Irish language services that have to be provided by that body. Once the regulations are in place, the burden on staff in the Department of Arts, Heritage and the Gaeltacht would be significantly reduced.<sup>174</sup> The merit of such an approach would ensure that there is greater consistency across the public sector as regards the delivery of Irish language services.<sup>175</sup> The standards system provides for a more streamlined approach.

However, beyond the introduction of a more streamlined standards approach, difficulties in effective implementation will continue to persist unless the issue of language competency and recruitment policy in the public sector is addressed in a more purposive and, again, streamlined manner. As noted by the former Language Commissioner, the State invests heavily in the teaching of the Irish language in the education system but on the other hand the State fails to facilitate the subsequent use of the Irish language by those who have acquired it.<sup>176</sup> There is, thus, a significant “missing link”.<sup>177</sup>

Moreover, if the recruitment policy in the public sector recognised competence in the two official languages and rewarded it appropriately, expenditure on translation and other language services would also be reduced over time.<sup>178</sup> Beyond an appropriate system of language training and education, far greater incentive, financial or otherwise, should be put in place to ensure that appropriate personnel with Irish language competency are attracted to work in the public sector to ensure the delivery of Irish language services across the public sector as determined by the classification and standards system. While not proposing a return to the compulsory language requirement, the Irish language needs to be recognised as a valuable skill and commodity in Ireland. There is no denying that language as the object of a right or legislative provision does place an onerous burden on the other, but without that communicative burden language rights and legislative provisions remain nothing more than an empty gesture on the part of the State. Addressing recruitment and language competency in the public sector in a committed and sustained manner will help to bridge the significant gaps between the normative justifications advanced for language legislative protection in Ireland and effective fulfilment in practice.

## CONCLUSION

Within the context of ongoing debate concerning reform of the OLA, the purpose of this article was to critically examine the Irish State's legal relationship with the Irish language. Tracing key law and language intersections in the history of the Irish State, the article pointed up antipathy, paradox and disconnect.

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174. *Review of the Official Languages Act 2003*, p.14.

175. *Review of the Official Languages Act 2003*, p.14.

176. *Review of the Official Languages Act 2003*, p.15.

177. *Review of the Official Languages Act 2003*, p.15.

178. *Review of the Official Languages Act 2003*, p.15.

Notwithstanding Ireland's complex post-colonial language history and the reluctance to engage with a minority and rights discourse in the interwar era, this article argued that the antipathy towards viewing the Irish language as a right in the Irish Constitution in 1937 has, in effect, negatively hindered the development of an institutional legacy and infrastructure within which key language legislative provisions under the OLA 2003 could be effectively realised. Though the OLA 2003 brought with it positive developments in terms of signage and visibility, the language scheme system, as the central provision of the OLA, was ill-conceived and, in truth, failed to fully understand the communicative and instrumental nature of language as the object of a right or legislative provision. Drawing on a body of jurisprudence from the Supreme Court of Canada that interprets the scope of language rights and language legislative guarantees, the article urged that the legal approach to the Irish language should be underpinned by a more "purposive" and substantive conception and vision of equality. In practice, this requires a commitment to ensure, or at least work towards ensuring, that the linguistic means are provided within which the delivery of Irish language services can be made a successful reality in the public sector. Though the fate of the Official Languages (Amendment) Bill 2014 remains, for now, unknown, the need for a reconceptualised debate about the role of law in the protection and promotion of the Irish language remains. The remit of that debate should not be limited solely to legislative reform of the OLA 2003 but should extend more broadly to the status of the Irish language under Art.8 of the Irish Constitution, to Ireland's reluctance to sign and ratify the ECRML, and to a re-evaluation of the place and status of the Irish language as an official EU language.